Hamaijuri bin Berawi v Joseph Design & Contract Sdn Bhd

HIGH COURT (SIBU) — CIVIL APPEAL NO SBW-12A-4/6 OF 2020
CHRISTOPHER CHIN JC
23 SEPTEMBER 2020

Civil Procedure — Summary judgment — Application for — Appeal against dismissal of summary judgment — Plaintiff and defendant entered into development and supplementary agreement — Plaintiff applied under O 14A of Rules of Court 2012 for summary judgment to be entered against defendant on question of construction of development agreement as supplemented — Sessions court dismissed application — Whether damages referred to in supplemental agreement payable to plaintiff — Whether plaintiff divested all his contractual, equitable or beneficial interest or rights to third parties

The parties entered into a development agreement dated 6 June 2005 ('the DA') whereby the defendant would develop the plaintiff's land and for which the plaintiff would be entitled ('the plaintiff's entitlement') to several units of houses. The plaintiff's entitlement was to be completed by 5 June 2010 but it could not be met. The parties entered into a supplementary agreement whereby the plaintiff's entitlement would be completed within two years of the supplementary agreement. Further liquidated damages were agreed upon and in addition a sum of RM80,000 per year until the plaintiff's entitlement were delivered. The plaintiff also entered into six sale and purchase agreements for six out of ten of the plaintiff's entitlement with third parties ('the S&Ps'). The contracting parties in these S&Ps were the plaintiff as vendor and the third party purchaser as buyer. The defendant contended that: (a) under the DA (as supplemented) the RM80,000 per year under cl 1(d) of the supplementary agreement would only be triggered in the event the respondent failed to obtain individual titles of the appellant's allocation two years after the date issuance of the certificate of fitness; and (b) as the plaintiff had sold six out of ten of his entitlement, he was only entitled to liquidated damages to the balance of four units houses. The plaintiff sought to recover the liquidated damages totalling RM619,685 and then sought to have the matter ruled under O 14A of the Rules of Court 2012 ('the ROC'). The sessions court dismissed the plaintiff's application seeking under O 14A of the ROC for summary judgment to be entered against the defendant on a question of the construction of the DA as supplemented. Hence, this appeal. The issues for consideration were: (i) whether the RM80,000 damages referred to in the supplemental agreement payable to the plaintiff; and (ii) whether the plaintiff divested all his contractual, equitable or beneficial interest or rights in the six units to the third parties.

Held, allowing the appeal:

(1) There was no provision to exclude cl 1(d) or any wording to allow the RM80,000 to be apportioned to the remaining units of the plaintiff's entitlement. The RM80,000 was a single figure to cover additional damages for all ten units of the plaintiff's entitlement and this was the intention of the parties when the supplemental agreement was executed. The circumstances which would justify the RM80,000 had changed through principally the actions of the plaintiff by disposing of six out of ten of the plaintiff's entitlement to third party purchasers. Hence the order for damages in relation to the RM80,000 must reflect the loss which the plaintiff suffered. The defendant failed to revisit and perhaps to vary the terms of the supplementary agreement when they were asked to be a party to some of the six S&Ps which were signed by the plaintiff when he disposed of six out of ten of the plaintiff's entitlement to third parties. Therefore the defendant was liable under the supplementary agreement. However, since the sum of RM80,000 was envisaged as damages for all ten units of the plaintiff's entitlement and since he had wholly divested his interest in six out of ten units to third party purchasers, for which the plaintiff had received valuable consideration, it would follow that his right to the RM80,000 would necessarily be adjusted to reflect his loss the units to which he remained entitled to under the DA as supplemented, that was to say four out of ten units (see paras 21–23, 26–27 & 30).

(2) The plaintiff started out being solely beneficially and absolutely entitled to ten units of residential development in the project representing the plaintiff's entitlement under the DA as supplemented. He had absolutely divested his entire right title and interest in six out of ten units of his plaintiff's entitlement to third parties. By doing so, the plaintiff ceased to have any further rights and/or interest in the six units of the plaintiff's entitlement under the DA as supplemented. The purchasers under the S&Ps were not entitled to the liquidated damages under the DA as supplemented as there was no privity of contract between the defendant and them in respect of the DA as supplemented (see paras 35–37).

[Bahasa Malaysia summary

Pihak-pihak menandatangani perjanjian pembangunan bertarikh 6 Jun 2005 ('DA') di mana defendan akan membangunkan tanah plaintif dan yang mana plaintif berhak ('hak plaintif') kepada beberapa unit rumah. Hak plaintif akan disiapkan pada 5 Jun 2010 tetapi tidak ia dapat dipenuhi. Pihak-pihak menandatangani perjanjian tambahan di mana hak plaintif akan disiapkan dalam dua tahun daripada perjanjian tambahan. Ganti rugi yang ditetapkan lebih lanjut dipersetujui dan sebagai tambahan sejumlah RM80,000 setiap tahun sehingga hak plaintif diserahkan. Plaintif juga menandatangani enam perjanjian jual beli untuk enam daripada sepuluh hak plaintif dengan pihak

ketiga ('S&P'). Pihak-pihak yang berkontrak dalam S&P ini adalah plaintif sebagai penjual dan pembeli pihak ketiga sebagai pembeli. Defendan berpendapat bahawa: (a) di bawah DA (seperti tambahan) RM80,000 setiap tahun di bawah klausa 1(d) perjanjian tambahan hanya akan dicetuskan sekiranya responden gagal memperoleh hakmilik individu yang diperuntukkan oleh perayu dua tahun selepas tarikh pengeluaran sijil layak menduduki; dan (b) oleh kerana plaintif telah menjual enam daripada sepuluh haknya, dia hanya berhak mendapat ganti rugi yang ditetapkan terhadap baki empat unit rumah. Plaintif berusaha untuk mendapatkan kembali ganti rugi yang ditetapkan berjumlah RM619,685 dan kemudian memohon agar perkara itu diperintah di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('ROC'). Mahkamah sesyen menolak permohonan plaintif yang menuntut di bawah A 14A ROC untuk penghakiman terus terhadap defendan atas persoalan tafsiran DA seperti tambahan. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan adalah: (i) sama ada ganti rugi RM80,000 yang dirujuk dalam perjanjian tambahan perlu dibayar kepada plaintif; dan (ii) sama ada plaintif melupuskan semua kepentingan atau hak kontrak, ekuiti atau benefisial dalam enam unit tersebut kepada pihak ketiga.

Diputuskan, membenarkan rayuan:

(1) Tiada peruntukan untuk mengecualikan klausa 1(d) atau sebarang kata-kata yang membenarkan RM80,000 untuk dibahagikan kepada baki unit kelayakan plaintif. RM80,000 adalah satu angka untuk menampung ganti rugi tambahan untuk semua sepuluh unit hak plaintif dan ini adalah niat pihak terbabit ketika perjanjian tambahan itu dilaksanakan. Keadaan yang membenarkan RM80,000 telah berubah melalui secara prinsip tindakan plaintif dengan memindahkan enam daripada sepuluh hak plaintif kepada pembeli pihak ketiga. Oleh itu, perintah ganti rugi berkaitan dengan RM80,000 mesti menggambarkan kerugian yang ditanggung oleh plaintif. Defendan gagal mengubah dan mungkin menukar syarat-syarat perjanjian tambahan apabila mereka diminta untuk menjadi pihak kepada enam S&P yang ditandatangani oleh plaintif ketika dia memindahkan enam daripada sepuluh hak plaintif untuk pihak ketiga. Oleh itu, defendan bertanggungjawab di bawah perjanjian tambahan. Namun, oleh kerana sejumlah RM80,000 dianggap sebagai ganti rugi untuk semua sepuluh unit hak plaintif dan oleh kerana dia telah sepenuhnya melepaskan kepentingannya dalam enam daripada sepuluh unit kepada pembeli pihak ketiga, yang mana plaintif telah mendapat pertimbangan berharga, maka ini diikuti bahawa haknya untuk RM80,000 semestinya disesuaikan untuk mencerminkan kerugiannya terhadap unit yang dia kekal berhak di bawah DA seperti tambahan, iaitu empat daripada sepuluh unit (lihat perenggan 21–23, 26–27 & 30).

(2) Plaintif pada mulanya berhak sepenuhnya ke atas sepuluh unit

pembangunan kediaman dalam projek yang mewakili hak plaintif di bawah DA sebagai tambahan. Dia sememangnya telah melepaskan keseluruhan hak dan kepentingannya dalam enam daripada sepuluh unit hak plaintifnya kepada pihak ketiga. Dengan berbuat demikian, plaintif tidak lagi memiliki hak dan/atau kepentingan lebih lanjut terhadap enam unit hak plaintif di bawah DA sebagai tambahan. Pembeli di bawah S&P tidak berhak atas ganti rugi yang ditetapkan di bawah DA sebagai tambahan kerana tiada hubungan kontrak antara defendan dan mereka berkenaan dengan DA sebagai tambahan (lihat perenggan 35–37).]

Cases referred to

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501; [2007] 4 CLJ 725, FC (refd)

Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299; [2012] 1 CLJ 49, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

Rules of Court 2012 O 14A, O 55 r 5

Chieng Lee Sing (Lau & Company) for the appellant.
Ben Lau Le Bin (Lau & Assoc) for the respondent.

Christopher Chin JC:

[1] The parties are referred to herein as they were described in the action before the lower court.

BRIEF BACKGROUND

The plaintiff's perspective

[2] The parties entered into a development agreement dated 6 June 2005 ('DA') whereby the defendant would develop the plaintiff's land and for which the plaintiff would be entitled ('plaintiff's entitlement') to:

Two units double storey semi-detached houses.

Three units double story intermediate terrace houses.

One unit single storey corner terrace house.

Three units single storied intermediate terrace houses.

[3] The plaintiff's entitlement was to be completed by the 5 June 2010 ('the completion date'). A

[4] The completion date could not be met and the parties entered into a supplementary agreement dated 7 June 2010 whereby plaintiffs' entitlement would be completed within two years of the supplementary agreement. B

[5] Further liquidated damages were agreed upon:

Single-storey house	—	RM250 per month
Double-storey terrace house	—	RM300 per month
Semi-detached house	—	RM500 per month

C

[6] In addition a sum of RM80,000 per year until the plaintiff's entitlement were delivered. D

[7] The plaintiffs' entitlement had the occupation permit issued on the 31 October 2017 and the individual documents of title on the 7 January 2019.

E

[8] The plaintiff's claim was therefor the liquidated damages totaling RM619,685 plus interest and costs.

[9] In summary: F

Date of the development agreement	6 June 2005
Contracted date of completion	6 June 2010
Date of supplementary agreement	7 June 2010
Date of issuance of occupation permit	31 October 2017
Date of issuance of documents of title	7 January 2019

G

The defendant's perspective

H

[10] The defendant contends:

Firstly, that under the DA (as supplemented) the RM80,000 per year under cl 1(d) of the supplementary agreement would only be triggered in the event the respondent fails to obtain individual titles of the appellant's allocation two years after the date issuance of the certificate of fitness. The individual titles were issued on the 8 January 2019 which is less than two years from the date of the issuance of the certificate of fitness I

A Secondly, that as the plaintiff has sold six out of ten of his entitlement, he is left with the balance of four units single-storey terrace houses.

[11] Hence the plaintiff is entitled to liquidated damages under the DA (as supplemented) to only RM250 per month multiplied by four units of houses calculated from 7 June 2012 (date of the supplemental agreement) to 3 October 2017 (the date of the issuance of the occupation permit).

APPEAL

[12] The plaintiff sought to recover the said RM619,685 plus interest and costs in the lower courts and then sought to have the matter ruled under O 14A of the Rules of Court 2012. The O 14A application was disallowed and hence this appeal.

[13] The plaintiff as appellant appeals under O 55 r 5 of the Rules of Court 2012 against the decision of the learned sessions court judge made other than after trial and delivered on the 27 May 2020. The plaintiff's notice of appeal in under encl 27.

[14] The decision appealed against is where the session court dismissed the plaintiff's notice of application ('encl 7') seeking under O 14A for summary judgment to be entered against the defendant on a question of the construction of the DA as supplemented.

[15] The plaintiff cited the following authority for proceeding with the O 14A application:

> In *Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168; [1972] 1 LNS 31 Raja Azlan Shah J (as his Royal Highness then was) pointed out that in an O 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. Although that case made reference to O 14 (as O 14A had only been inserted into the Rules of High Court by PU(A) 342/2000), the overeaching principle that can be derived from that case is crystal clear — that the court is perfectly entitled to decide a case summarily based on the true construction of documents without the need for a trial.

[16] The defendant cited the following case as laying down the principle for the court to consider in deciding O 14A cases.

[17] In *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299; [2012] 1 CLJ 49 the Federal Court held:

[5] It is trite law that O 14A of the RHC may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*; refd). Where the issues of facts are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so, would in effect be to give rulings in vacuo or on a hypothetical ruling, which the court will not do.

[6] The trial court's notes of proceedings failed to address whether the relevant or material facts were in dispute. Besides, there were serious disputed facts involved which were interwoven with the legal issues raised. As such, O 14A of the RHC was not suitable to have determined the applicability of s 314 of the Act to the partnership.

ISSUES

[18] I believe the key issues are just two:

Firstly, following the sale of six out of ten of the plaintiff's entitlement to third parties, had the plaintiff divested all his contractual, equitable or beneficial interest or rights in the six units to the third parties;

Secondly, under what condition is the RM80,000 damages referred to in the supplemental agreement payable to the plaintiff.

SUPPLEMENTAL AGREEMENT

[19] The supplemental agreement dated 7 June 2010 provided as follows, paraphrasing:

Clause 1.0(a)

The defendant is to complete the plaintiff's entitlement up to the stage of the issuance of their occupation permit within two years of the date of the supplementary agreement being 7 June 2010, that is to say 6 June 2012 ('extended completion date').

Clause 1.0(b)

The defendant is to obtain the issuance of the separate documents of title for the plaintiffs' entitlement within two years following the extended completion date, which is to say by 5 June 2014.

Clause 1.0(d)

If the defendant shall still default in tis obligation stipulated in either cll 1(a) or 1(b) hereof two years after the extended completion date the defendant shall compensate the plaintiff an additional sum of RM80,000 for each year of default.

[20] Working out the dates:

The occupation permit must be issued by the 6 June 2012.

The documents of title must be issued by the 5 June 2014.

The occupation permit was issued on the 31 July 2017.

The documents of titles were issued on the 7 January 2019.

[21] The parties have entered into a contract in writing and are thus bound by the terms therein. The clauses offer no alternative interpretation as I can see. I see no provision to exclude cl 1(d) or any wording to allow the RM80,000 to be apportioned to the remaining units of the plaintiff's entitlement. This leads me to conclude that the RM80,000 was a single figure to cover additional damages for *all* ten units of the plaintiff's entitlement and this was the intention of the parties when the supplemental agreement was executed.

[22] The undisputed facts show that the plaintiff had earlier disposed of six out of the ten units of the plaintiff's entitlement. The circumstances which would justify the RM80,000 has changed through principally the actions of the plaintiff by disposing of six out of ten of the plaintiff's entitlement to third party purchasers.

[23] Hence my order for damages in relation to the RM80,000 must reflect the loss which the plaintiff suffered.

[24] The defendant argues, relying on *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725, that the cl 1(d) of the supplemental agreement providing for the RM80,000 would be a penalty and that the plaintiff would have to prove its loss.

> (5) The mere use of a formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s 75 of the Contracts Act. It is a matter of construction and depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if the intention is to assess damages for breach of the contract, it is liquidated damages.
>
> (5a) Considering cl 8 objectively as a whole, the learned judge was correct in holding that, applying s 75, the clause is a penalty in that it constitutes a threat held against the appellant to perform the contract and not a genuine pre-estimate of the damage likely to be suffered by the respondent in the event of a breach. Further, the usage of the phrase 'a debt shall arise as calculated in accordance with cl 8.2 and the debt shall be payable by STKG as a result of the cancellation of this agreement' does not ipso

facto rule out the probability that the sum payable can be a 'sum named in the contract' for the purposes of s 75 of the Contracts Act. Accordingly, we are in agreement with the conclusion by the learned High Court judge that 'there shall be an order that damages be assessed in respect of the loss suffered'. In the circumstances, whilst we do not have to answer question (ii) in its original text in view of our answer to question (iii), the answer, if we have to, would have to be in the negative with the result that the respondent would not be able to claim the sum computed in accordance with the cl 8 formula.

[25] However I believe that the RM80,000 was an agreed or 'liquidated' figure by the parties, principally by the defendant, to compensate the plaintiff if there were further delays in the performance of the defendant's contractual obligations in relation to the timely delivery of the plaintiff's entitlement. It is to be noted when the supplementary agreement was signed, the defendant was already late in the delivery of the plaintiff's entitlement to the plaintiff under the DA.

[26] The defendant failed to revisit and perhaps to vary the terms of the supplementary agreement when they, the defendant, were asked to be a party to some of the six S&Ps which were signed by the plaintiff, as vendor, when he disposed of six out of ten of the plaintiff's entitlement to third parties.

[27] It is therefore abundantly clear that the defendant is liable under the supplementary agreement for.

[28] Liquidated damages for the plaintiff's entitlement from 6 June 2012 (deadline for occupation permit) to 31 July 2017 (date of occupation permit).

[29] The sum of RM80,000 per annum from the 5 June 2014 (deadline for the issuance of the documents of title) to the 7 January 2019 (date of the issuance of the documents of titles) in respect of all ten units of the plaintiff's entitlement.

[30] But since the sum of RM80,000 was envisaged as damages for all ten units of the plaintiff's entitlement and since he has wholly divested his interest in six out of ten units to third party purchasers, for which the plaintiff had received valuable consideration, it would follow that his right to the RM80,000 would necessarily be adjusted to reflect his loss the units to which he remains entitled to under the DA as supplemented, that s to say four out of ten units.

THE PLAINTIFF'S ENTITLEMENT FOR WHICH LD IS PAYABLE

[31] The plaintiff entered into six sale and purchase agreements for six out of ten of his plaintiff's entitlement with third parties ('the S&Ps').

A **[32]** The contracting parties in these S&Ps are the plaintiff as vendor and the third party purchaser as buyer.

B **[33]** As these units are residential units it is safe to assume that these S&Ps are regulated S&Ps mandated under Sarawak's Housing Laws and therefore contain certain basic provisions for the protection of the purchasers which cannot be contracted out of.

C **[34]** Clause 17 of the S&Ps required the defendant (as the developer) to pay the third party purchaser liquidated damages for late delivery. Strangely, the developer was made a party to some but not all of the S&Ps.

D **[35]** It is therefore clear that the plaintiff started out being solely beneficially and absolutely entitled to ten units of residential development in the project representing the plaintiff's entitlement under the DA as supplemented.

E **[36]** It is equally clear that he has absolutely divested his entire right title and interest in six out of ten units of his plaintiff's entitlement to third parties. This has to be so otherwise the said purchasers would not be able to get clean title for the units they purchased from the plaintiff.

F **[37]** By doing so, the plaintiff ceases to have any further rights and/or interest in the six units of the plaintiff's entitlement under the DA as supplemented. The purchasers under the S&Ps are not entitled to the liquidated damages under the DA as supplemented as there is no privity of contract between the defendant and them in respect of the DA as supplemented.

G **[38]** The plaintiff had conveyed his chose in action being the contractual rights derived from the DA (as supplemented) signed with the defendant as developer. He did not assign his rights in the supplementary agreement to the purchasers as suggested by the defendant's counsel. Had it been an assignment by the plaintiff of his rights under the DA (as supplemented) to his third party purchasers in the manner envisaged in s 4(3) of the Civil Law Act 1956, the third party purchasers would have been entitled to the damages in the supplementary agreement.

I **[39]** The S&Ps were dated in 2012 and 2011 which meant the houses were delivered late beyond the 24 months construction period permitted in them (cl 17 of the S&Ps). The defendants has averred that it had paid liquidated damages to the plaintiff's third party purchasers for the delay in completion as computed by the terms of the S&Ps. This was not disputed by the plaintiff.

[40] Based on my decision on the above two issues it remains for me to order as follows.

[41] The appeal by the plaintiff against the decision of the learned sessions court judge is allowed and which is now substituted with the following.

[42] Notice of application under encl 7 is allowed on the terms of this decision:

(a) the defendant is liable for liquidated damages payable to the plaintiff but only in relation to four out of the ten units he is entitled to being sublots, 51, 52, 53 and 54 and nothing for the remaining six units that were sold by the plaintiff to third parties;

(b) the damages for the four units is calculated at RM250 per month for each of the four units, prorated for the first and last month;

(c) the damages in (2) above is to be calculated for each unit from 6 June 2012 (date of supplemental agreement) to 31 July 2017 (date of occupation permit);

(d) additional damages of RM32,000 per annum (contracted damages of RM80,000 divided by ten units and multiplied by four the remaining units of the plaintiff's entitlement) prorated for the first and last year calculated from the 5 June 2014 to the 7 January 2019 payable by the defendant to the plaintiff;

(e) interest at the rate of 5%pa from the date of this order till the date of full settlement; and

(f) costs of RM7,000 to the plaintiff/appellant, subject to allocator.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh